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ARTICLE 86 EC, THE EC'S ECONOMIC APPROACH TO COMPETITION LAW, AND THE GENERAL INTEREST

GARETH DAVIES*

A. INTRODUCTION

Article 86 EC is intended to regulate the relationship between services of general economic interest (SGEIs) and the economic rules found in the EC Treaty, notably those on competition, state aid and free movement.¹ On the one hand it provides that states must not regulate SGEIs in a way conflicting with these Treaty rules, in Article 86(1), but on the other it provides also that the rules will not apply to undertakings providing SGEIs if this would obstruct their public service mission, in Article 86(2). The article therefore emphasises that economic law does in principle apply to SGEIs, but also provides that this application may be limited where necessary. It embodies a compromise between the benefits of the free market and social interests, such as the need for universal access to important services and the stable, high quality provision of these, which may be better served by regulated, even restricted markets.

The primary assumption upon which Article 86 rests is that without such a dedicated Treaty rule economic law would harm these social interests.² The strict requirements of competition law, and to a lesser extent free movement, would prevent states from enacting important and justified but market-restricting measures, such as the granting of partial monopolies or exclusive rights in certain areas. It would become impossible to exercise the necessary control over providers and services in fields such as education, healthcare, transport and the utilities, which require close control in the name of universal access, equality of access, quality of provision and safety. A secondary assumption is that Article 86(1) actually extends the scope of competition law to state measures that would otherwise fall outside it.

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¹ In the Treaty on the Functioning of the European Union this will become Art 106, should the Lisbon Treaty be ratified and come into force.

² See, eg W Sauter, "Services of General Economic Interest and Universal Service in EU Law" (2008) 33 *European Law Review* 167; J Baquero Cruz, "Beyond Competition: Services of General Interest and European Community Law" in G de Burca, *EU Law and the Welfare State* (Oxford University Press, 2005), 169.

It is the purpose of this paper to question these assumptions. It aims to show that economic law either takes account of or is capable of taking account of general interest considerations, and that measures necessary to serve legitimate social goals will not conflict with this law in the first place. Moreover, Article 86(1) does not in fact extend the scope of application of competition law. Thus neither Article 86(1) nor Article 86(2) adds content to the Treaty.

This is not just an academic point. The apparently important presence of Article 86 leads national authorities to overestimate the protection it offers while also overestimating the destructive force of competition law. Both errors exert a distorting force on national policy, with the first also leading to a risk of future conflict with the Treaty and resulting national policy chaos. If the state is to respond rationally and legally to Treaty rules it needs an understanding of the declaratory and insubstantial nature of Article 86.

However, a broader and more important point concerns the relationship between Article 86 and competition law. Article 86 is believed to be primarily important because it allows restrictions of competition which would otherwise be prohibited. Articles 81 and 82 are perceived to be strict and unforgiving, with little room for considerations of general interest or public policy. It is suggested here that this understanding of competition law is at odds with its new “economic” orientation. An economics-based competition law does not, indeed cannot, prohibit public or private measures which are necessary in the general good.³ Reliance on Article 86 is therefore inconsistent with the increasingly economic approach to competition, and even threatens to undermine it. The more that general interest considerations are shunted off to Article 86(2), the less they will be internalised in the competition rules themselves, and the less these rules will come to be economically realistic and responsible. That will lead to bad, inefficient and incoherent policy.

This is therefore an argument about the nature of competition law, and its relationship to competition economics. The suggestion is that Article 86 embodies a fundamental misunderstanding; the erroneous view that the general good is in some sense “non-economic” and cannot be included within Articles 81 and 82. That view, it is suggested, has implications beyond the specific SGEI context, and represents a threat to European welfare in both the popular and the economic senses of the word.

The article looks first at Article 86(1), then Article 86(2), and finally at what competition economics has to say about the role of the general interest in competition law.

³ PJ Hammer, “Antitrust beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-best Tradeoffs” (2000) 98 *Michigan Law Review* 849; see also W Kerber and A Christiansen, “Competition Policy with Optimally Differentiated Rules instead of “Per Se” Rules vs Rule of Reason” (2006) 2 *Journal of Competition Law & Economics* 215.

B. WHAT DOES ARTICLE 86(1) DO?

If read literally, Article 86(1) is no more than declarative.⁴ It states that Member States may not, with respect to undertakings to which they grant special rights, “enact or maintain in force any measure contrary to the rules in this Treaty”. In this phrase Article 86(1) seems quite explicitly to make a violation of itself dependent upon a prior violation of another article. There is therefore no violation of Article 86(1) unless a measure is maintained which violates another Treaty rule. The article adds, on this reading, no new obligation.

However, it is possible to read the article more broadly, so that “contrary to” means something like “against the spirit of” or “undermining of”. Then a state might enact rules which undermined some Treaty article without actually violating it as such, and Article 86(1) might catch this behaviour.

This reading is problematic, since it suggests some middle ground between “permitted” and “forbidden”, some kind of good-faith obligation, which many lawyers and legal traditions would resist furiously.⁵ Surely, if the Treaty does not forbid a given measure, then states are free to do it? How can a measure be contrary to the “spirit” of an article yet not contrary to that article itself? Such a rule is really an indirect and untransparent extension of the prohibition in question. It is at best a very clumsy legal technique, at worst an undermining of the legislative decision to extend the prohibition in question so far and no further.

There is one situation where it may be defensible: where the state helps private parties to violate provisions of the Treaty—competition law, invariably—that are aimed at them. Because the prohibitions are not addressed to the state, it does not violate Articles 81 and 82 itself. However, there is an obvious argument that somehow the state should be prevented from helping others to break laws addressed to them. Aiding and abetting the crime of another is usually, and reasonably, a crime in itself.

This view is reflected in the existence of Article 10 EC, the duty of loyalty, which creates a general obligation on states not to undermine the Treaty, in addition to the specific obligations imposed by specific articles. The conjunction of Article 10 and Articles 81 and 82 is a long-established way of addressing the situation described above, where states act as accomplice or facilitator of private Treaty violations.⁶

⁴ J Temple Lang, “Privatisation of Social Welfare: European Union Competition Law Rules” in **Dougan and Spaventa** (eds) *Social Welfare and EU Law* (Oxford, Hart Publishing, 2005), 46.

⁵ Cf O Lando, “Is Good Faith an Over-arching General Clause in the Principles of European Contract Law?” (2007) 15 *European Review of Private Law* 841.

⁶ Eg Case 13/77 *INNO v ATAB* [1977] ECR 2115; Case 267/86 *van Eycke* [1988] ECR 4769; Case 311/85 *Vlaamse Reishureaus* [1987] ECR 3801; Case C-2/91 *Meng* [1993] ECR I-5751; Case C-185/91 *Reiff* [1993] ECR I-5801.

It is therefore not obvious that Article 86(1) does anything that Article 10 does not already do, and that doubt is only fuelled by the fact that Article 86(1) has traditionally been described as a specific expression of Article 10, as one instance of the general rule.⁷ This would suggest that Article 86(1) cannot in principle have a broader scope than Article 10. However, as a *lex specialis* Article 86(1) might contain useful added specificity, enabling a broader application in practice. Is this the case? The positions under Articles 10 and 86(1) are considered below in the context of two controversial questions. One is whether state action that restricts competition is caught by either or both of these articles in combination with competition rules even without an associated competition infringement by an undertaking. Is state responsibility necessarily linked to anti-competitive private behaviour? If so—and the answer is found to be positive—how tight must that link be? What degree of causation is sufficient?

1. Public Measures Restricting Competition under Articles 10 and 86

Where the state helps undertakings to make anti-competitive agreements, this is assessed under the combination of Articles 10 and 81. Where the state encourages abuse, this is assessed under Articles 86(1) and 82. This division of labour results largely from the wording of Article 86(1), which, in referring to the grant of “special and exclusive rights”, makes itself the natural home for issues of dominance and abuse, while not speaking so naturally to issues of private co-operation. Nevertheless, there is no principled division, and in particular the European Court of Justice (the Court) has made clear that Article 10 could apply to a public measure facilitating abuse,⁸ while it is not unimaginable that the grant of special and exclusive rights to a group of undertakings might have the effect of supporting or encouraging in some way agreements contrary to Article 81.⁹

In any case, it matters little because the principles of state responsibility are the same under either Article 10 or Article 86. Under Article 10 these stem back to *INNO v ATAB*, where the Court stressed both the obligation of states not to take action jeopardising the objectives of the Treaty and the status of Article 86(1) as a derivative of Article 10.¹⁰ However, it is the expression in the later *Van Eycke* case that is more often relied upon:

“The Court has consistently held, however, that Articles 85 and 86 [now 81 and 82] of the Treaty, in conjunction with Article 5 [now 10], require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may

⁷ Case 18/88 *GB-INNO* [1991] ECR I-5941.

⁸ C-142/94 *DIP v Comune di Bassano del Grappa* [1995] ECR I-3257; *GB-INNO*, *ibid.*

⁹ See text to n 67 *et seq.*

¹⁰ *INNO v ATAB*, *supra* n 6. See P-J Slot “The Application of Articles 3(f), 5 and 85 to 94 EEC” (1987) 12 *European Law Review* 179–189.

render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 [now 81] or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.”¹¹

This may be compared with the judicial formulas used where Article 86(1) is combined with Article 82. Here the Court finds that Article 86(1) prohibits the granting of rights “liable to create a situation where that undertaking is led to commit such abuses”,¹² which in some cases is refined to the suggestion that the special right must almost necessarily lead to the abuse,¹³ while others suggest that facilitating abuse or making it likely is sufficient.¹⁴

The starting point is therefore that the state will infringe the Treaty under one of these combinations if it facilitates or encourages infringements of competition law by undertakings, an apparently reasonable prohibition on public-private conspiracy. Nevertheless, there is some suggestion that the situation may be more complicated, namely that state actions which render private infringements superfluous might also be caught. This superfluity arises when the state legislates to put undertakings in a position which they could not have achieved themselves without violating competition rules. For example, where the state legislates to entrench fixed prices or standard specifications, the undertakings could only have achieved this result alone by an agreement contrary to Article 81, and if the state grants a monopoly, the lucky undertaking could probably only have achieved this by using exclusionary tactics that would have been classified as abuse. Yet in these cases the undertakings have not in fact made an agreement, nor behaved abusively. The question is therefore whether the state measures should still be caught by Articles 10 and 86(1).

As far as anti-competitive agreements go, this is generally considered to have been answered in the Court’s “November revolution”, in *Meng* and *Ohra*.¹⁵ Here the Court found that Article 10 could not apply in conjunction with Article 81

¹¹ *Van Eycke*, *supra* n 6.

¹² Case C-475/99 *Glückner* [2001] ECR I-8089.

¹³ Case C-340/99 *TNT Traco* [2001] ECR I-4109; Case C-323/93 *La Crespelle* [1994] ECR I-5077; Case C-41/90 *Höfner* [1991] ECR I-1979.

¹⁴ Case C-179/90 *Merci convenzionali porto di Genova*; Case C-163/96 *Raso* [1988] ECR 533; Case C-67/96 *Albany* [1999] ECR I-5751; Case C-115/97 *Brenhens* [1999] ECR I-6025; Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-209/98 *FFAD v København Kommune* [2000] ECR I-3743; Case C-147/97 *Deutsche Post* [2000] ECR I-825; Case C-38/97 *Librandi* [1988] ECR I-5955; Case C-49/07 *MOTOE* [2008] judgment of 1 July 2008 (nir).

¹⁵ *Meng*, *supra* n 6; Case C-245/91 *Ohra* [1993] ECR I-5851; Case C-185/91 *Reiff* [1993] ECR I-5801; see W Sauter “‘State’ and ‘Market’ in the Competition and Free Movement Case Law of the EU Courts”, TILEC discussion paper 2007–24, 82–87 (available on ssrn.com). The term “November revolution” comes from N Reich, “The ‘November Revolution’ of the European Court of Justice: Keck, Meng and Audi Revisited” (1994) 31 *Common Market Law Review* 459.

“in the absence of any link with conduct on the part of undertakings of the kind referred to in Article [81](1) of the Treaty”.¹⁶ In subsequent cases the Court has consistently investigated whether there was an actual agreement between undertakings, of the sort prohibited by Article 81, before considering whether the state may have supported this in a way violating Article 10. This does not mean that state measures independent of private action are acceptable per se—price control, for example, may infringe Article 28.¹⁷ However, Articles 10 and 81 will not be applied.

Where Article 82 is concerned the situation is more difficult. There has been a lively academic discussion of whether Article 86(1) in combination with Article 82 prohibits the creation of a dominant position per se or whether there is a necessary link with private abuse.¹⁸ Given that possession of a dominant position is not in itself contrary to Article 82, *prima facie* one would think that creating one should not automatically be a prohibited subversion of that Article. However, debate has been fuelled by two cases which seem to suggest the contrary, *GB-INNO* and *Corbeau*.¹⁹

In both of these cases an undertaking was entrusted with a monopoly over a given public service, in the former case telecoms services and in the latter postage. The core monopoly as such could be justified as necessary to guarantee a universal service, and was not in issue. However, its precise scope was challenged in both cases. In *GB-INNO* one of the privileges that the dominant undertaking, the RTT, enjoyed was regulatory authority over telecoms equipment. Anyone wishing to sell telephones on the Belgian market had to have them approved by the RTT, as the network operator. Competitors claimed that granting this power to RTT was in a violation of Article 86(1) since it amounted to an unjustified extension of a dominant position—something that, if done by the undertaking itself, would be in violation of Article 82. In *Corbeau* it was claimed that the postal monopoly was extended beyond what was justifiable. It included not only the market for regular postal services—where all parties appeared to agree that a monopoly could be justified—but also services involving collecting the post from the sender, a more specific and business-oriented market. *Corbeau* argued that this extended scope of the monopoly was not justifiable by

¹⁶ *Meng*, *ibid*, para 22.

¹⁷ Case 82/77 *Openbaar Ministerie v van Tiggele* [1978] ECR 25; Case 65/75 *Criminal Proceedings against Riccardo Tasca* [1976] ECR 291.

¹⁸ See, eg L Hancher (1994) 31 *Common Market Law Review* 105, annotation of *Corbeau*; L Gyselen (2000) 37 *Common Market Law Review* 425 annotation of *Albany*; D Edward and M Hoskins “Article 90: Deregulation and EC Law. Reflections arising from the XVI FIDE Conference” (1995) 32 *Common Market Law Review* 157; J Faull and A Nikpay (eds), *The EC Law of Competition* (Oxford University Press, 2007), para 6.80; Temple Lang, *supra* n 4.

¹⁹ Case 18/88 *GB-INNO* [1991] ECR I-5941; Case C-320/91 *Corbeau* [1993] ECR I-2533. See on this point eg A Gardner, “The Velvet Revolution: Article 90 and the Triumph of the Free Market in Europe’s Regulated Sectors” (1995) 16 *European Competition Law Review* 78; Temple Lang, *supra* n 4.

the need to ensure universal service. He then argued that if the undertaking itself had used its dominant position in the regular postal market to exclude parties from the more specific market, it would have been extending its dominance in an abusive way, contrary to Article 82. Therefore, he said, it followed that state measures achieving the same results—dominance in both markets—were contrary to Article 86(1). Thus in both cases the argument was made that state measures that achieved the same market-closing result as abuse would have achieved were contrary to Article 86(1) even without that abuse actually or potentially occurring. The state's obligation was claimed to be decoupled from that of the undertaking.

The Court appeared to confirm this in both cases, in *GB-INNO* saying that under Article 86(1) states must not “put public undertakings and other undertakings to which they grant special or exclusive rights in a position which the said undertakings could not themselves attain by their own conduct without infringing Article [82]”.²⁰ It later went on to say that

“it is the extension of the monopoly in the establishment and operation of the telephone network to the market in telephone equipment, without any objective justification, which is prohibited as such by Article [82], or by Article [86](1) in conjunction with Article [82], where that extension results from a measure adopted by a State.”²¹

In *Corbeau* it said that “the Treaty none the less requires the Member States not to adopt or maintain in force any measure which might deprive [the provisions of Article 82] of their effectiveness”²² and went on to consider whether the extension of the monopoly could be justified under Article 86(2). It seemed, in other words, to assume that Article 86(1) applied to the state measure, despite not suggesting anywhere in the judgment that the *Regie des Postes* was itself guilty of any abuse.

Neither case is really unconventional. In both cases it is easy to conclude on the facts that the state was encouraging abuse of dominance, so that the link between public and private infringements is not broken at all. In *GB-INNO* this is so because RTT was placed in a position where it could approve entry to the telecoms equipment market by competitors, something which invites abusive behaviour. This certainly counts as liable to create a situation where an undertaking is led to commit abuse.²³ This view is supported by comments the Court made later in the judgment suggesting that this was its primary objection to the situation:

²⁰ *GB-INNO*, *ibid*, para 20.

²¹ Para 24.

²² *Corbeau*, *supra* n 19, para 11.

²³ See *La Crespelle*, *supra* n 13; Case C-69/91 *Decoster* [1993] ECR I-5335; *MOTOE*, *supra* n 14.

“To entrust an undertaking which markets terminal equipment with the task of drawing up the specifications for such equipment, monitoring their application and granting type-approval in respect thereof is tantamount to conferring upon it the power to determine at will which terminal equipment may be connected to the public network, and thereby placing that undertaking at an obvious advantage over its competitors.”²⁴

About *Corbeau* there are two arguments to be made. One is that the distinction between “creating a dominant position per se” and “facilitating abuse” is an unconvincing one, bearing in mind this latter phrase includes facilitation of *potential* abuse, ie making it easier to commit abuse in the future.²⁵ A dominant position inevitably makes abuse easier, indeed actively encourages it. Undertakings are self-interested. If one gives them market power, they are likely to use it in ways that Article 82 would consider exploitative or exclusionary. So it may well be correct that creating a dominant position is often contrary to the combination of Articles 86 and 82,²⁶ as is in fact expressed to be the position under Articles 10 and 82.²⁷ This will be the case if the special rights create a risk of abuse, and any such abuse would be a sufficiently direct consequence of the rights granted, that is to say sufficiently foreseeable or inevitable.²⁸ Just as undertakings holding a dominant position have a “special responsibility” not to impair competition,²⁹ it may be argued that states creating dominant positions have a special responsibility to ensure that doing so does not lead to abuse.

The second argument is that the grant of the dominant position was almost certainly contrary to the rules on free movement and establishment.³⁰ It is orthodox that public measures closing service markets comprise restrictions on these freedoms.³¹ Since such measures benefit an incumbent, they are also likely

²⁴ *GB-INNO*, *supra* n 19, para 25.

²⁵ See text to n 48 below.

²⁶ See Gardner, *supra* n 19, and *infra*, section B.2, for discussion of precisely when this is the case.

²⁷ Case C-96/94 *Spediparto* [1995] ECR I-2883; C-142/94 *DIP v Comune di Bassano del Grappa* [1995] ECR I-3257.

²⁸ See *MOTOE*, *supra* n 14; *La Crespelle*, *supra* n 13, para 20; *infra*, section B.2.

²⁹ Case 322/81 *NV.Nederlandsche Banden Industrie Michelin v Commission of the European Communities* [1983] ECR 3461.

³⁰ See Edward and Hoskins, *supra* n 18, 173–75; Temple Lang, *supra* n 4.

³¹ See Case T-266/97 *VTM* [1999] ECR I-2329; Case 229/83 *Au blé vert* [1985] ECR I; *La Crespelle*, *supra* n 13; *Merci Convenzionali*, *supra* n 14; Case C-309/99 *Wouters* [2002] ECR I-1577; Case C-94/04 *Cipolla* [2006] ECR I-11421; Case 30/87 *Bodson* [1988] ECR 2479; *GB-INNO*, *supra* n 19; Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-277/91 *Ligur Carni* [1993] ECR I-6621; see also the Advocate General in Case C-446/05 *Doulamis*, judgment of 13 March 2008, but cf the Court in the same case mysteriously ignoring his orthodox free movement argument, no doubt for reasons of judicial economy (the question was not actually asked by the national court). On justification, see Case C-55/94 *Gebhard* [1995] ECR I-4165; Case 120/78 *Cassis de Dijon* [1979] ECR 649.

to be indirectly discriminatory.³² In both cases they will be prohibited unless they serve a legitimate goal and are proportionate—ie they do not exceed what is necessary to achieve that goal. Assuming that the grant of the extended dominant position in *Corbeau* exceeded what could be justified by the legitimate public service goals—as the Court suggested might be the case and instructed the national judge to consider—it was therefore contrary to the Treaty without having to consider complicated constructions involving competition law.³³

However, if an undertaking is granted an illegal exclusive right, as was probably the case in *Corbeau*, is it odd to suggest that the exercise of this right should be treated as abusive? ³⁴ Undertakings may be treated as capable of bearing some responsibility and of taking legal advice. If the state hands them a prohibited weapon, they may still be punished for using it. On this view, if the grant of rights infringed free movement law, then merely exercising those rights would have been a violation of Article 82—a wrongful profiting from a wrongful dominant position. But this, in turn, would mean that the liability of the state under Article 86 would be quite conventional, since anti-competitive private behaviour directly resulting from the public measure would now be involved.³⁵

There is thus a chain of causation: the state is caught by free movement rules and the undertaking which tries to profit from public behaviour contrary to these is caught by Article 82, so the state is additionally responsible for facilitating abusive behaviour. What this pathway really makes clear is how illogical the use of Article 86 (or Article 10) in this context is. While free movement may once have been more restrictively interpreted, it is addressed clearly to states, and is perfectly capable of regulating and preventing unjustified anti-competitive regulation in a far more rational, transparent and obvious manner than is the case when state obligations are piggy-backed on those of undertakings.³⁶

³² Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-462/99 *Connect Austria* [2003] ECR I-5197. See also Case C-405/98 *Gourmet International* [2001] ECR I-1795; Case C-387/93 *Banchero* [1995] ECR I-4663; Case 155/73 *Sacchi* [1974] ECR 409.

³³ See Temple Lang's reference to the "artificial argument" in *GB-INNO*, *supra*, n 4, 59. Note that the outcome via either Art 86 or free movement ultimately turns on the proportionality of the measure—see the "limited competition" interpretation of Art 86 described by Edward and Hoskins, *supra* n 18, 167.

³⁴ Sauter, *supra* n 15, 104–106; Case C-198/01 *CIF* [2003] ECR I-8055; Case C-359/95 P *Ladbroke* [1997] ECR I-6265; Temple Lang, *supra*, n 4, 55–59.

³⁵ This makes it entirely irrelevant that the state put an undertaking in a position which it could not have achieved on its own without abusive behaviour. The private abuse necessary to activate public liability is not that which was rendered superfluous, which did not occur, but that which is likely to occur, which is encouraged.

³⁶ Free movement law only applies to measures having a cross-border aspect. However, these include measures which potentially hinder market entry or which potentially disadvantage non-national undertakings, as well as all those which discriminate. The threshold is thus not higher than the competition requirement that a measure affect inter-state trade, and in some cases lower.

The result of *Corbeau* is therefore not odd, only the lack of clear reasoning in the judgment. However, it would be unconvincing to read too much into this. There is a relative abundance of subsequent case law that reaffirms the necessity of a link with a private infringement:

Article 86(1) applies “only if the undertaking in question, merely by exercising the special or exclusive rights conferred upon it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses”.³⁷ If *Corbeau* is interesting, it is therefore for two reasons: (i) because it implicitly extends the definition of abuse to include the voluntary exercise of illegally granted rights; and (ii) because it may be a judicial recognition that granting dominance will generally lead to abuse. It does not, however, extend the reach of Community law supervision to new areas, and nothing in the result could not have been achieved by a conventional application of either Articles 10 and 82 or, more rationally, the establishment and services rules.

2. The Public–Private Nexus

The most difficult unanswered question about the relationship between public liability and private infringements is what degree of support or causation or inducement there must be for the state to be caught. As well as being of obvious general importance, this is relevant to the interpretation of *Corbeau*. If creating a dominant position is sometimes per se contrary to Article 86, but not always, then the distinction is likely to turn on the degree of linkage between the public and private action.

At one extreme, it is quite clear that if the state “forces” undertakings to engage in certain action, then neither Article 10 nor Article 86 will apply. In such a situation the undertaking lacks the autonomy necessary for it to bear responsibility for its own actions:

“Articles [81] and [82] apply only to anti-competitive conduct engaged in by undertakings of their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which in itself eliminates any possibility of competitive activity on their part, Articles [81] and [82] do not apply. In such a situation the restriction of competition is not applicable, as those provisions implicitly require, to the autonomous conduct of undertakings.”³⁸

It follows that there is no private infringement which could trigger a public one.

³⁷ Case C-475/99 *Glückner* [2001] ECR I-8089 para 39. See also eg Case C-115/97 *Brenjens* [1999] ECR I-6025; Case C-340/99 *TNT Traco* [2001] ECR I-4109; *La Crespelle*, *supra* n 13; *Raso*, *supra* n 14; Case C-203/96 *Dusseldorp* [1998] ECR I-4075; Case C-209/98 *FFAD v Københavns Kommune* [2000] ECR I-3743; Case C-147/97 *Deutsche Post* [2000] ECR I-825; Case C-38/97 *Librandi* [1998] ECR I-5955; Case C-69/91 *Decoster* [1993] ECR I-5335; *Höfner* *supra* n 13; *Merci*, *supra* n 14; *MOTOE*, *supra* n 14.

³⁸ Case C-359/95 P *Ladbroke* [1997] ECR I-6265 paras 33–4.

Nevertheless, although the logic is compelling, some cases are less than clear on this point. For example, in *Bodson*, local authorities in France granted exclusive rights to funeral service providers, and as part of the contract these undertook to charge what were in fact abusively high prices. The Court found that

“In so far as the communes imposed a given level of prices on the concession holders, in the sense that they refrained from granting concessions for the ‘external services’ to undertakings if the latter did not agree to charge particularly high prices, the communes are covered by the situation referred to in Article [86(1)] of the Treaty . . .”

The implication is that the undertakings here had no choice, and the high prices were in fact dictated by the authorities. Similarly, in *Höfner*, the Court found that a public authority is in breach of Article 86(1) when it creates a situation where an undertaking “cannot avoid” infringing Article 82.³⁹ The suggestion is again that simply acting as the law required was enough to comprise an abuse, and that this situation was caught by Article 86(1).

In fact, in both *Bodson* and *Höfner* the Court found that the state facilitated abuse, even put pressure on the undertakings to engage in it, but not to the extent that they were deprived of autonomy. In both cases this was retained to the extent that it was possible to speak of an infringement by the undertaking of Article 82, and this infringement was a precondition for the finding of liability for the state under Article 86. There was no “forced abuse”, no automatism and no state control, as a careful reading of the cases shows.

In *Höfner* confusion may initially arise because the Court does say at one point that the state has created a situation where the undertaking “cannot avoid” infringing Article 82. The fact that this is self-contradictory should sound a warning bell, and just two paragraphs later it rephrases matters as “a Member State is in breach of [Articles 86(1) and 82] only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position”.⁴⁰

The introduction of the words “merely by exercising” is crucial. That “mere exercise” is a voluntary act, and is what makes it possible to speak of “abuse” at all.⁴¹ The undertaking in *Höfner* had been granted an exclusive right by the state to provide employment services of a certain kind, but it also had the power not to enforce that exclusivity, as clearly emerges from the discussion of the facts in the judgment. In certain areas, where it did not have sufficient expertise, it tolerated the provision of services by other undertakings.⁴² It had the power to

³⁹ *Höfner*, *supra* n 13, para 27.

⁴⁰ *Ibid*, para 29.

⁴¹ Similarly *La Crespelle* n 13; *Merci*, *supra* n 14; *TNT Traco* *supra* n 13.

⁴² Paras 8–10.

choose whether to exercise and enforce its exclusive right or not. The state may have given it rights that positively invited it to engage in abuse, but the actual abuse—the exercise of these rights—was nevertheless a decision by those controlling the undertaking. The fact that the state encouraged, even pressured, the undertaking is not treated by the Court as a defence to Article 82.

Similarly, in *Bodson* the Court explicitly addresses the issue of whether the undertaking was forced into its actions. This was raised as a defence to the Article 82 accusation, and met with the response

“That argument cannot be accepted. It is clear from the documents before the Court that the grant of the concession for “external services” for funerals is regarded in France as a contract concluded between the commune and the concession holder, which, moreover corresponds to the view taken by the national court. It follows from that finding that the level of prices is indeed attributable to the undertaking, since the latter assumes full responsibility for the contracts which it has concluded.

Insofar as the communes imposed a given level of prices on the concession holders, in the sense that they refrained from granting concessions for ‘external services’ if the undertakings if the latter did not agree to charge particularly high prices, the communes are covered by the situation referred to in Article [86(1)] of the Treaty.

... [public authorities] may not therefore assist undertakings holding concessions to charge unfair prices by imposing such prices as a condition for concluding a contract for a concession.

The word “imposed” is indeed used, but it is very clear from the text as a whole that the Court considered the undertakings to have sufficient autonomy to bear autonomous responsibility. They did not have to engage in a contract to do what amounted to the abusive exploitation of consumers. It sums up its interpretation of Article 86(1) as a prohibition on “assisting” undertakings in abuse.

The question remains “why the language of force?” Since the Court clearly finds that in substance the undertakings had a choice, why does it muddy the waters by using words implying state control? The reason, it is suggested, is to make clear the basis of public responsibility: there must be a sufficient nexus between the public measures and the abuse. As argued above, any exclusive rights benefit the position of an undertaking and so, by making it stronger, may facilitate anti-competitive behaviour in some sense. However, this is not necessarily enough to implicate the state. Yet equally, too tight a link might also break the chain, by reducing the autonomy of the undertaking below what is necessary for the finding of “abuse” upon which state responsibility depends.

The descriptions of when Article 86(1) applies range from state-created situations where an undertaking “cannot avoid” abuse to situations “creating a risk of an abuse”.⁴³ This latter is particularly helpful because it is offered as a summary of the various other phrases used. In a recent case, *La Crespelle*, the

⁴³ *Höfner*, *supra* n 13; *MOTOE*, *supra* n 14. See J Faull and A Nikpay (eds), *The EC Law of Competition* (Oxford University Press, 1999), 275–76.

this is a different year from n 18; is it the same or a different publication?

Court says that “The question to be examined is therefore whether such a practice constituting the alleged abuse is the direct consequence of the national Law”.⁴⁴ Article 10 cases, by contrast, typically refer to rendering competition rules “ineffective” or “encouraging” anti-competitive agreements.⁴⁵

It is clear that, as with reasonableness or proportionality, it is difficult to describe a threshold for sufficient causation in a precise way. It is unlikely that the different formulas are intended to express varying principles; rather, they are different expressions of a common idea. This is probably most clearly captured in the most-repeated phrase that the state must not act in a way “liable to create a situation where that undertaking is led to commit such abuses” or, it is submitted, is led to conclude anti-competitive agreements.⁴⁶ Thus it is not sufficient that the state action in some indirect way makes anti-competitive behaviour easier—it must have the effect of “inducing” or steering or leading the undertaking in the wrong direction so that the private act can be seen as a “direct consequence” of the public one. On the other hand, there must be sufficient commercial autonomy remaining that the undertaking can be held liable for the transactions it enters into. There must be some voluntarism on the part of the undertaking, even if this amounts to little more than agreeing to take the state’s shilling. Thus, if the state authorises, or even fixes, excessive charges, an undertaking will still abuse its dominance when it chooses to impose or collect those charges on customers.⁴⁷ However, if the state prohibits the transport of certain kinds of goods at certain times, which in practice means that a dominant undertaking is unable to supply competitors, then the undertaking will not infringe competition law simply because it does not unilaterally ignore the national law, with the consequence that Article 86(1) cannot be triggered.

Finally, it may be noted that state responsibility should not be dependent upon the private infringement having actually occurred. Since *Dassonville* the Court has quite reasonably been concerned to interpret economic law pre-emptively and proactively.⁴⁸ Both Article 81 and Article 82 also catch actions which aim to restrict competition, even if there are no demonstrable effects.⁴⁹ Logic and broader policy thus provide every reason to think that if a situation

⁴⁴ *La Crespelle*, *supra* n 13, para 20.

⁴⁵ *GB-INNO*, *supra* n 19, para 31; *van Eycke*, *supra* n 6, para 16; *Reiff*, *supra* n 6, para 14; Case C-153/93 *Delta* [1994] ECR 2157, para 14; *Spediporto*, *supra* n 27, para 20; Case C-35/99 *Arduino* [2002] ECR I-1529, para 34; See Case 66/86 *Ahmed Saeed* [1989] ECR 803, para 49. See E Szyszczak, *The Regulation of the State in Competitive Markets* (Oxford, Hart Publishing, 2007), 14–15 and 72–73.

⁴⁶ See *supra* n 37.

⁴⁷ Case C-340/99 *TNT Traco* [2001] ECR I-4109; Case 30/87 *Bodson* [1988] ECR 2479; C-242/95 *GT-Link* [1997] ECR I-4449.

⁴⁸ Case 8/74 *Dassonville* [1974] ECR 837.

⁴⁹ Eg Case 123/83 *BNIC v Clair* [1985] ECR 391; T-219/99; Case T-203/01 *British Airways* [2003] ECR II-5917; P-J Loewenthal, “The Defence of Objective Justification in the Application of Article 82 EC” (2005) 28 *World Competition* 455, 455.

inducing an infringement has been created, the state may be called to account without waiting for the undertaking to actually do wrong.⁵⁰ One may note here the Court's reiteration that Article 10 requires states not to introduce legislation "which *may* [my italics] render ineffective the competition rules", not just "which renders ineffective".⁵¹ One may also note *Saeed*; "[the] authorities must refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements".⁵² In light of this, it is suggested that the *Meng* requirement that there be a "link with conduct on the part of undertakings" does not have to mean that such conduct must have already occurred.⁵³ In the Article 86 context the emphasis is similarly structural, on the creation of the situation rather than the events to date:

"In those circumstances a legal framework such as that which results from the 1994 Law must be regarded as being in itself contrary to Article [86](1) in conjunction with Article [82] of the Treaty. In that regard, it is therefore immaterial that the national court did not identify any particular case of abuse by the reconstituted former dock-work company."⁵⁴

Once again, a final connection with free movement must be made. It seems that Article 86 adds nothing to Article 10, and that both of them are used to address situations where the state regulates in a way helping undertakings to exclude competitors, either on their own or as part of a cartel. Such measures will invariably be restrictions on free movement.⁵⁵ Article 86(1) is thus doubly redundant. The important question is therefore not which Treaty Article reigns, but whether a measure is justified and proportionate—the condition for legality under free movement law, but also the issue addressed by Article 86(2).

C. WHAT DOES ARTICLE 86(2) DO?

Article 86(2) seems more useful than Article 86(1), providing as it does for a clear restriction on the application of the Treaty to undertakings entrusted with

⁵⁰ See J Buendia Sierra, *Exclusive Rights and State Monopolies Under EC Law* (Oxford University Press, 1999), 265; H Schepel, "Delegation of Regulatory Powers to Private Parties under EC Competition Law: Towards a Procedural Public Interest Test" (2002) 39 *Common Market Law Review* 31, 35–36.

⁵¹ *GB-INNO*, *supra* n 19, para 31; *van Eycke*, *supra* n 6, para 16; *Reiff*, *supra* n 6, para 14; *Delta*, *supra* n 45, para 14; *Spediporto*, *supra* n 27, para 20; *Arduino*, *supra* n 45, para 34.

⁵² *Saeed*, *supra* n 45, para 49.

⁵³ *Meng*, *supra* n 6, para 22; Advocate General Jacobs in *Albany*, *supra* n 14, 402–03.

⁵⁴ *Raso*, *supra* n 14, para 31. The Court interestingly cites *GB-INNO* in support, confirming the interpretation of that case as concerning inducement to abuse.

⁵⁵ *Supra* n 31.

economic services of general interest.⁵⁶ The Treaty only applies to these undertakings insofar as it does not “obstruct” the performance of their special obligations. The Court has interpreted this to mean that the behaviour must be “necessary” for the discharge of the public interest obligations in issue.⁵⁷

This looks like an important guarantee that economic law does not prevent general interest missions being carried out. Undertakings with an SGEI task are granted a special derogation insofar as they may need it. This derogation is also important for states; insofar as undertakings are exempted from competition law, public measures supporting their behaviour run no risk of conflict with Article 86(1) or Article 10 in combination with the competition rules. Article 86(2) determines the scope of the obligation in Article 86(1). It would be a more obvious structure were the order of the two articles to be reversed: first determine if the undertaking’s behaviour is anti-competitive and then, if so, reiterate that the state may not support it.

The disappointment of Article 86(2) is, however, that it adds nothing to derogations already existing elsewhere in the Treaty, notably within competition and free movement law. Behaviour by dominant undertakings that serves the general interest is not, the cases wisely suggest, abuse. Where agreements serve general interest goals they do not violate Article 81 anyway. Restrictions of free movement by public undertakings which are genuinely necessary for public interest goals do not violate the free movement articles in the first place. There is no attack on the general interest by economic law against which Article 86(2) must defend. It tilts at windmills. The following sections expand on this.

1. Is Behaviour in the Public Interest “Abuse”?

The status of SGEIs within Articles 81 and 82 raises one of the fundamental questions about the relationship between competition law and non-economic interests. Can competition take account of anything other than a narrowly understood range of economic arguments? Prima facie, one would expect that if behaviour is genuinely necessary in order to provide a universal service to inhabitants of a state, then Article 82 is severely defective if it labels this behaviour “abuse”. Abuse is a pejorative term, clearly intending to catch inappropriate or wrongful use of dominance. If that dominance is in fact being used for a worthy and recognised goal, at the request of the state, in what sense is it being abused?

⁵⁶ Or “services of general economic interest”, as the Treaty persists in mistakenly describing them: see G Davies “The Process and Side-effects of the Harmonisation of European Welfare States”, Jean Monnet Working Paper 02/06, 37–38 (available on ssrn.com).

⁵⁷ Eg *Corbeau*, *supra* n 19; Case C-157/94 *Commission v Netherlands* [1997] ECR I-5699; *Albany*, *supra* n 14; *TNT Traco*, *supra* n 13.

It is commonly argued that Article 82 should be interpreted in an “objective” or “effects-based” or even “economic” way.⁵⁸ One approach to this would define abuse in terms of action that has a competition-reducing effect. This would leave no room for “justifications” based on reasons external to those effects.⁵⁹ A similar result could be arrived at using a traditional, less economic, more normative interpretation: competition is a good in itself, and Article 82 prohibits dominant companies, without exception, from reducing it.⁶⁰

However, this no-justification approach presents great practical problems. A number of actions can have the effect of reducing competition and so changing the market structure, but these may vary from particularly effective marketing creating customer loyalty to predatory pricing and refusal to supply. Looking only at effects on competitors would provide no basis for distinguishing between legitimate successful business tactics and illegitimate ones, and would turn Article 82 into a ban on success.⁶¹ Any competition regulator is therefore forced to look not just at effects, but at method—what is it that the dominant party is doing to achieve this result? But many actions are ones that might be taken for entirely legitimate reasons—cost reductions because of efficiencies, refusal to supply because supply is genuinely limited—or with the intention to exclude. If competition law is not to collapse into central planning, doing nothing more than maintaining the status quo balance between companies, then it has to distinguish between such situations, allowing competition to be reduced when it is the result of good business tactics, but perhaps not in other circumstances. What this amounts to in substance is asking whether the company in question has an explanation for its behaviour other than the desire to exclude. It is therefore unsurprising that the European Court of Justice increasingly uses the idea of justification in the Article 82 context, looking to see whether behaviour can be explained by, for example, legitimate commercial factors, and only finding abuse where this is not the case.⁶²

What is important here is that the Court has acknowledged that justifications do not just need to be narrowly commercial—the public interest could in principle suffice. In *Hilti* and *Tetrapak* the Court conceded that actions which

⁵⁸ See, eg B Sher, “The Last of the Steam-powered Trains: Modernizing Article 82” [2004] *European Competition Law Review* 243; A Albors-Llorens, “The Role of Objective Justification and Efficiencies in the Application of Article 82 EC” (2007) 44 *Common Market Law Review* 1727, 1752–59; Chalmers, *European Union Law* (Cambridge University Press, 2006), 1064–67.

⁵⁹ Albors-Llorens, *ibid*, 1734–35; Loewenthal, *supra* n 49, 459–66.

⁶⁰ See DJ Gerber, *Law and Competition in Twentieth Century Europe* (Oxford University Press, 1998), ch 7 on the ordoliberal background; A Pera, “Changing Views of Competition, Economic Analysis and EC Antitrust Law” (2009) 4 *European Competition Journal*.

⁶¹ See T Eilmansberger, “How to Distinguish Good from Bad Competition under Article 82 EC: In Search of Clearer and More Coherent Standards for Anti-competitive Abuses” (2005) 42 *Common Market Law Review* 129.

⁶² Albors-Llorens, *supra* n 58; Loewenthal, *supra* n 49; Monti, *EC Competition Law* (Cambridge University Press, 2007) 203–11.

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would normally be abuse might not be if they were necessary for legitimate public policy reasons—the issue in question was whether a refusal to supply certain goods could be justified on grounds of health and safety. The companies lost their argument on the facts because they simply could not show that this was the real reason, or an adequate reason in the circumstances, for their action. This was particularly so because they had undertaken their protective actions without being asked to by the public authorities, and without asking the public authorities. Quite rightly, the Court considered that one must be skeptical of claims by commercial organisations to be acting in the public interest on their own initiative. If private organisations can define the public interest, they pre-empt what should be decided in the public domain in a democratic process.⁶³ A successful public interest defence raised by an undertaking, on its own initiative, will therefore be exceptional, and should only be possible for truly uncontroversial interests—for example, where a clear public health danger is in fact demonstrably at issue.

However, this highlights precisely the difference between these cases and the SGEI situation. Where an undertaking has been entrusted with an SGEI and is engaging in behaviour at the specific request of the state in order to ensure universal access to a service of general interest, it is not the undertaking that is unilaterally defining the public interest; rather, its defence is that the state has defined the goal in question as being in the public interest. Proportionality review remains, but the risk of a democratic deficit raised by the *Hilti* and *Tetrapak* situations is removed.⁶⁴

The judgments provide support for this. In both cases the Court implicitly accepted that pursuit of the public interest might render behaviour non-abusive, but found on the facts that the undertakings could not show that this was their true goal.⁶⁵ The major reason was that they had not obtained, or sought, any state approval or support for the actions that they claimed the public interest demanded. The Court found that undertakings could not, on their own initiative, autonomously determine the public interest, pursue it and expect this to excuse them from Article 82.⁶⁶ Once this objection is taken away, by an SGEI entrustment, it seems most plausible that actions which the state approves as necessary to provide an important social service, and which do not fail the proportionality test, simply do not violate Article 82. Article 86(2) is once again irrelevant.

⁶³ See also E Loozen, “Professional Ethics and Restraints of Competition” (2006) 31 *European Law Review* 28, 42–45.

⁶⁴ See C Schmid, “Diagonal Competence Conflicts between European Competition Law and National Regulation—A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing” (2000) 8 *European Review of Private Law* 155.

⁶⁵ Albers-Llorens, *supra* n 58, 1756.

⁶⁶ Cf *Bosman*, *supra* n 31.

2. Article 86(2) and Agreements Restricting Competition

The arguments made above can also be applied to apparently collusive behaviour that is in fact necessary for SGEI provision, and the Court unsurprisingly takes a somewhat similar approach, accepting in principle that actions in the public interest are not within the Treaty definition of a restriction on competition.⁶⁷

Such useful collusion is not unusual. In SGEI contexts the state often wants undertakings to be involved in decision-making about service provision and the structure of the market. Agreements on quality of service or technical standards, or even on customer allocation or market division, may be supported and encouraged, in the interests of stability and quality.

Prima facie, where undertakings sit down and agree such things they are violating the Article 81 prohibition on agreements whose object or effect is to restrict competition. The effect of such agreements is certainly to restrict the ways in which undertakings may compete, and often who may compete and on what terms. However, in a line of cases going back more than ten years the European Court of Justice has been quite consistent that such agreements do not violate Article 81 if their restrictive effect on competition is no more than ancillary to a genuine public interest goal.⁶⁸

There are two paths to this result. One is summarised in *Wouters*, where the Court said that if:

“a Member State, when it grants regulatory powers to a professional association, is careful to define the public-interest criteria and the essential principles with which its rules must comply and also retains its power to adopt decisions in the last resort . . . [then in that case] the rules adopted by the professional association remain State measures and are not covered by the Treaty rules applicable to undertakings.”⁶⁹

Thus, where the state delegates decision-making to a group of undertakings, with sufficient control mechanisms to ensure that agreements serve the public interest and not just the self-interest of those undertakings, notably a state-reserved power to derogate from the agreements if necessary, their conclusions are not agreements at all in the Article 81 sense. This was not, on the facts, actually the

⁶⁷ G Monti, “Article 81 and Public Policy” [2002] *Common Market Law Review* 1057; R Whish, *Competition Law* (Oxford University Press, 5th edn, 2003), 120–27; W Sauter, “Services of General Economic Interest and Universal Service in EU Law” (2008) 33 *European Law Review* 167, 183, with reservations; similarly V Hatzopoulos, “Health Law and Policy: The Impact of the EU” in G de Burca (ed), *EU Law and the Welfare State* (Oxford University Press, 2005) 111, 159, but restricting the exclusion to agreements with a “social purpose”; M Marquis, “O₂ (Germany) v Commission and the Exotic Mysteries of Article 81(1) EC” (2007) 32 *European Law Review* 29; R O’Loughlin, “EC Competition Rules and Free Movement Rules: An Examination of the Parallels and their Furtherance by the ECJ *Wouters* Decision” (2003) 24 *European Competition Law Review* 62.

⁶⁸ Case C-519/04 P *Meca-Medina* [2006] ECR I-6991; *Wouters*, *supra* n 31; *Albany*, *Brentjens* and *Librandi*, all *supra* n 14; *Arduino*, *supra* n 45; Case C-219/97 *Drijvende Bokken* [1999] ECR I-6121.

⁶⁹ *Wouters*, *ibid.*, para 68.

case in *Wouters*, but in other cases it has been, and the principle is no longer controversial.⁷⁰

The other path, however, is contested. This is where the Court finds that undertakings have concluded an agreement that limits competition but does not violate Article 81(1) because it serves a legitimate public interest. The “nature and purpose” of the agreement,⁷¹ or its “objectives” and “context”,⁷² mean that it should be seen not as a restriction on competition but as a general interest measure.

Thus, in *Albany* the Court found that agreements between undertakings concerning pensions were not prohibited by Article 81 because they were necessary for a legitimate social purpose, even though they inevitably had a certain competition-reducing effect.⁷³ However, the leading case is now *Wouters*. Here bar council rules which restricted competition and amounted to an agreement between undertakings were nevertheless not prohibited by Article 81 because they were necessary for the proper regulation of the legal profession, and the restriction of competition that was entailed was no more than was inherent in the regulatory role.⁷⁴ Subsequently, in *Meca-Medina* the Court found that sporting rules agreed between commercial sport organisations, even though they restricted competition, were outside Article 81:

“even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants’ freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC, since they are justified by a legitimate objective.”⁷⁵

The clear line running through these cases is that agreements between undertakings which restrict competition are nevertheless not within the Article 81 prohibition if they go no further than is necessary to serve a legitimate objective, be that proper regulation of the professions, the proper conduct of sport or social policy. The Court has not spelled out in so many words which objectives it would consider legitimate in this context, but it is hardly controversial to suggest that it is public interest objectives that it has in mind, rather than objectives serving the interests of the undertakings in question.

Nevertheless, a number of arguments have been made for a narrower reading. For example, it has been suggested that *Wouters* should be understood

⁷⁰ *Arduino*, *supra* n 45; See also *Librandi*, *supra* n 14. See D Nazzini, “Article 81 EC between the Present and Time Past: A Normative Critique of ‘Restriction of Competition’ in EU Law” (2006) 43 *Common Market Law Review* 497, 503–504.

⁷¹ *Albany*, *supra* n 57, para 60.

⁷² *Wouters*, *supra* n 68, para 97.

⁷³ See also *Brentjens*, *supra* n 14; *Drijvende Bokken*, *supra* n 68.

⁷⁴ *Wouters*, *supra* n 31.

⁷⁵ *Meca-Medina*, *supra* n 68, para 45.

more narrowly, as only applying to “deontological ancillarity”—the ethical regulation of professional activities, within the context of general regulatory principles laid down by the state, also referred to as “regulatory ancillarity”.⁷⁶ There is, however, no support for this narrow reading in the case. While *Wouters* does indeed concern regulation of a profession, the Court in this case, and also in *Meca-Medina*, emphasised the legitimate objective of the agreements in general, rather than suggesting that professional regulation was different from other legitimate public interest goals. Indeed, any such distinction would be arbitrary from an economic, policy or competition perspective. Loozen argues that the important point is that in situations of deontological ancillarity the parties are under sufficiently tight legislative constraints that their action can be considered as legitimately delegated regulation, which is not the case where they are given more freedom to implement more general goals.⁷⁷ However, if the argument of an undertaking is that its action is in fact necessary to achieve a legitimate state-defined goal, then the question of whether this is so, and they are in fact carrying out a public mission, is evidential rather than principled. As she suggests, the fundamental Article 81 issue is whether the limitation on competition is welfare enhancing, and while the degree of legislative constraint may be evidentially relevant to that, there is no logical reason why it should be conclusive.⁷⁸

It has also been suggested that a distinction should be made between agreements which actually increase competition in some way (eg vertical restraints), which may compensate for the decrease which they cause in other ways, and agreements which have other, more public interest-like benefits.⁷⁹ The first might escape Article 81(1) as being ultimately pro-competitive, while the second would have to find some non-competition justification. It has been argued that *Wouters* can be understood, at least partly, in the light of this distinction, since the measures involved could be seen as having some pro-competitive effects, the proper functioning of the bar being necessary for effective competition.⁸⁰ This was also the suggestion of the Advocate General in the case.

However, the distinction is economically arbitrary.⁸¹ As the Court of First Instance (CFI) has said, the economically relevant distinction is between rules

⁷⁶ E Loozen, “Professional Ethics and Restraints of Competition” (2006) 31 *European Law Review* 28 (written before the ECJ judgment in *Meca-Medina*); R Whish, *Competition Law* (Oxford University Press, 6th edn, 2008), 126.

⁷⁷ Loozen, *ibid.*

⁷⁸ See M Gal and I Faibish, “Six Principles for Limiting Government-facilitated Restraints on Competition” (2007) 44 *Common Market Law Review* 69, 70–75.

⁷⁹ Advocate General Leger in *Wouters*, *supra* n 68; Nazzini, *supra* n 70.

⁸⁰ See Nazzini, *ibid.*; see also AJ Vossestein’s annotation to *Wouters* [2002] 39 *Common Market Law Review* 841.

⁸¹ See Loozen, *supra* n 76, 37–38; *infra* section 5.

increasing consumer welfare and those decreasing it,⁸² but in a situation of market failure this distinction does not correspond to a simple distinction between “more” or “less” competition.⁸³ The idea of separating “pro-competitive” effects from “public interest” effects is essentially a formal one, resting as it does on the mechanism by which welfare may be increased, rather than the substantive issue of whether it actually is. Since the distinction lacks any policy basis, it is perhaps not surprising that in *Wouters* the Court did not use it, and found the agreement in question to fall outside Article 81 not because it in fact increased competition in some way, but, as O’Loughlin puts it, “on a public interest type justification relating to professional secrecy and avoidance of conflicts of interest, and unrelated to the operations and functioning of the bar from a competition perspective”.⁸⁴ Even if there were “pro-competitive” effects at issue, and relevant to the final decision, there were also classic public interest ones, and the Court considered them all without categorisation before concluding that the “proper practice” of the legal professions justified the rule and therefore saved it from Article 81. This is the language of the global public interest, not of a narrow assessment of net competitive effects.⁸⁵

The position is perhaps most clearly summarised by the CFI. It has been very sceptical of the integration of public interest arguments into Article 81(1), refusing to accept that a rule of reason has been introduced.⁸⁶ However, now that Article 81(3) is directly effective, the difference between 81(1) and 81(3) becomes of rather academic interest.⁸⁷ The substantive issue is which agreements are caught by the Article 81 prohibition as a whole. Here the CFI has provided a remarkably pithy analysis, in support of which it cited *Wouters*:

“However, not every agreement which restricts the freedom of action of the participating undertakings, or of one of them, necessarily falls within the prohibition in Article 81 . . . as the objective of the Community competition rules is to prevent undertakings, by restricting competition between themselves or with third parties,

⁸² See text to n 88 *infra*.

⁸³ *Ibid*; Gal and Faibish, *supra* n 78; Hammer, *supra* n 3; S Breyer, *Regulation and its Reform* (Boston, Harvard University Press, 1982), esp 15–16.

⁸⁴ O’Loughlin, *supra* n 67, text to n 37. See also Nazzini’s bidimensional test, *supra* n 70, 521–27; Sauter, *supra* n 2, noting that the issue is contested; more cautiously, but similarly, Vossestein, *supra* n 80, 859, suggesting that the agreement may have been “pro-competitive” in the sense that it improved quality and choice for consumers. The inclusion of “quality”, which he also links to professional ethics, makes his concept of “pro-competitive” rather similar to a public interest notion, given that we are talking about legal services, not objects.

⁸⁵ Nazzini, *ibid*; See also E Szyszczak “State Intervention and the Internal Market” in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century* (Oxford, Hart, 2004) 217, 235, noting that the same justifications were used to escape Art 81 as to escape free movement rules.

⁸⁶ See Marquis, *supra* n 67.

⁸⁷ See Marquis, *ibid*. Odudu suggests Art 81(1) is concerned with allocative efficiency and Art 81(3) with productive efficiency: O Odudu “A New Economic Approach to Article 81(1)” (2002) *European Law Review* 100. Cf Nazzini’s distinction between “economic welfare” and other interests, Nazzini, *supra* n 70.

from reducing the welfare of the final consumer of the products in question (paragraph 118 above), it is still necessary to demonstrate that the limitation in question restricts competition, to the detriment of the final consumer.”⁸⁸

The condition that restrictions act to the detriment of the consumer before conflicting with the Treaty is economically entirely sound, and entails a balancing of factors before determining whether an agreement is prohibited.⁸⁹ That balancing may sometimes be complex, since it includes all factors relevant to the welfare of the consumer, and the consumer, as *Wouters* implicitly acknowledges, is not always only interested in price.⁹⁰

Therefore, despite continuing ambiguities, the outcomes in *Wouters* and *Meca-Medina*, combined with the public interest type language in those cases, mean that the most plausible reading of this case law as a whole is that Article 86(2) is irrelevant to agreements between undertakings in the context of SGEIs. Where they take place within the context of a state-approved public interest function and are necessary for public interest objectives, they will fall within the *Wouters* exemption anyway.⁹¹ If they are not necessary, then they are self-serving and Article 86(2) will not protect them.

There are certainly evidential issues raised.⁹² A rather vague public mission may easily be abused by a group of undertakings to create a cartel under the cover of public service,⁹³ and unless the undertakings can show that the state approves and requires their activities, and that law or regulation constrains them sufficiently to act within the limits of the public service goal and not just in their own commercial interests, they will have a hard task relying on the Court’s exemption. In both *Albany* and *Wouters* it was demonstrable that the undertakings were to a significant extent required by law and their own statutes to act in the public interest. However, in *Meca-Medina* this was not so clearly the case, and the Court did not make this point decisive in any of the cases. The principle embodied by the cases is therefore more general: agreements restricting competition which are genuinely and demonstrably necessary to achieve a public interest goal do not violate Article 81.

3. Article 86(2) and State Aid

As regards state aid, it is clear since *Altmark* that a fair price paid for defined services does not constitute aid.⁹⁴ Thus, if the state wishes to pay an undertaking

⁸⁸ Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969, para 171.

⁸⁹ *Supra* n 67; Odudu, *supra* n 87; *infra* section E.

⁹⁰ *Infra* section E.

⁹¹ This is remarkably similar to the US “State Action Doctrine”, discussed in Gal and Faibish, *supra* n 78, 98; On the State Action Doctrine in EC law see J Baquero Cruz, *Between Competition and Free Movement: The Economic Constitutional Law of the EC* (Oxford, Hart, 2002), 127–161.

⁹² See Gal and Faibish, *ibid*, for thorough proposals on how to deal with these.

⁹³ See, eg C-35/96 *Commission v Italy* [1998] ECR I-3851; *BNIC v Clair*, *supra* n 49.

⁹⁴ Case C-280/00 *Altmark* [2003] ECR I-7747.

to provide a universal service, or to provide a service to those who cannot pay for it themselves, then as long as it states clearly what exactly is to be provided and what exactly is to be paid, and the rates are not above normal market ones, state aid rules are not a problem. Thus Article 86(2) would only be useful if a state wished to move money towards an undertaking in some ambiguous and undefined way or if it wished to pay more than was actually necessary to provide the services—if it wished to turn on the cash tap to provide open-ended support for the undertaking, as has so often been the tradition in Europe. Yet this behaviour would not survive Article 86(2) either.⁹⁵ The Court has interpreted this article, quite reasonably, to mean that state behaviour which would normally violate the Treaty, but is necessary to maintain the public service task, is permitted.⁹⁶ There is therefore a necessity requirement. The degree of judicial scrutiny of necessity is variable and not always intense,⁹⁷ but funding on an open-ended or undefined basis, in excess of fair or market rates for the service in question, would inevitably exceed what is necessary. There are good reasons for states to purchase services on behalf of the population as a whole or segments of it, and the state aid rules do not inhibit this. There are not, generally, good reasons for states to provide solvency guarantees to undertakings,⁹⁸ and even Article 86(2) would not save these. None of this excludes the possibility that, were a major SGEI undertaking to teeter on the edge of failure, with potential consequences for the availability of the service, the state might be permitted to step in and take emergency measures. However, this is because the rules on state aid envisage such a situation and provide for it.⁹⁹ Article 86(2) remains an irrelevance.

4. Article 86(2) and Free Movement

Article 86(2) concerns the application of the law to undertakings. The classical use of free movement rules is against states. However, in circumstances where undertakings—public or even private—do in fact have the power to generally

⁹⁵ The rather odd Commission decision on the application of the state aid rules to SGEIs (2004/842/EC) states, correctly, that it only applies to payments not meeting the *Altmark* criteria, and thus falling within the state aid rules. However, it then sets conditions for the legality of such payments that are substantially identical to the conditions in *Altmark*. Since the decision exempts such payments from notification, it is more a clarification and enactment of *Altmark* than an addition to it. See O. Lynskey, “The Application of Article 86(2) EC to Measures which do not Fulfil the *Altmark* Criteria: Institutionalising Incoherence in the Legal Framework Governing State Compensation of Public Service Obligations” (2007) 30 *World Competition* 153.

⁹⁶ *Corbeau*, *supra* n 19; *Commission v Netherlands*, *supra* n 57; *Albany*, *supra* n 57; *TNT Traco*, *supra* n 13.

⁹⁷ See *infra* section D.

⁹⁸ See Case C-83/01 P *Chronopost* [2003] ECR I-6993. See also AG Jacobs in Case C-126/00 *GEMO* [2003] ECR I13769, 110ff.

⁹⁹ See Szyszczak, *supra* n 45, 196; Art 87(3)(e).

restrict free movement, the rules apply to them.¹⁰⁰ This has most commonly occurred where undertakings play a quasi-regulatory role within a particular economic sector, notably sport. It could also occur where an undertaking enjoys supervisory or regulatory powers connected with its special SGEI role, for example as in *GB-INNO* or *La Crespelle*. The undertaking could then be argued to be restricting free movement, and Article 86(2) might therefore seem to have a useful role in enabling them to escape its broad prohibitions.

However, by contrast with competition, free movement has a developed and explicit notion of justification and exception. Free movement is not absolute, and behaviour restricting it is only prohibited insofar as it is not justified by legitimate goals and proportionate to those goals.¹⁰¹ The category of justifications which may be accepted is an open one, bounded by the notion of the “general good” or the “public interest”.¹⁰² The goal of guaranteeing universal and adequate access to services of general interest can obviously fall within this, and a measure genuinely necessary to enable that is extremely unlikely to be disproportionate. The overlap between Article 86(2) and the existing derogations from free movement is complete. An undertaking that is honestly trying to achieve social goals within the framework of a state-imposed SGEI mission, rather than profiting from protectionism, has little to fear from free movement law in the first place.

D. DOES ARTICLE 86 ENTAIL A LESS INTENSE REVIEW?

If general interest derogations exist within competition and free movement law, the question arises whether these are as generous as Article 86. An argument that is often cited is that review of acts by undertakings or, more commonly, state measures under Article 86 is more forgiving than it would be if derogations internal to economic law were being applied.¹⁰³ In particular, measures wishing to rely on these derogations must be not only in the service of a legitimate goal, but also proportionate. By contrast, in order to rely on the Article 86 exemption, the measure must, according to the Court, simply be necessary for the discharge of the SGEI obligation. It is certainly possible to interpret “necessary” as an abridged version of proportionality, something lesser and less intrusive, without a

¹⁰⁰ Case C-438/05 *ITWF v Viking* [2007] ECR I-10779; *Meca-Medina*, *supra* n 68; Case 36/74 *Walrave and Koch* [1974] ECR 1405.

¹⁰¹ See *Gebhard*; *Cassis de Dijon*; *Bosman*; all *supra* n 31.

¹⁰² See Case 33/74 *van Binsbergen* [1974] ECR 1299; Case C-55/94 *Gebhard* [1995] ECR I-4165; Case C-76/90 *Säger v Dennemeyer* [1991] ECR I-4221. In pending Case C-567/07 *Servatius* the Court has been asked whether Art 86 offers broader justifications than may be found within free movement.

¹⁰³ W Sauter “Services of General Economic Interest and Universal Service Obligations as an EU Law Framework for Curative Healthcare”, TILEC discussion paper 2007–29, available at ssrn.com; Baquero Cruz, *supra* n 2, 169, 187–97.

balancing of interests or the search for an alternative less restrictive means of achieving the same end.¹⁰⁴ Indeed, in a number of cases the Court has emphasised that states do not have to show that there is no other way of achieving their goals.¹⁰⁵ It is sufficient that within the structure and SGEI entrustment that they have chosen the given measure is a necessary element. This seems to afford a greater discretion to Member States to design their systems of SGEI delivery, in the security that no cogs in the final machine will be displaced by the law, so long as those cogs really are important to the machine.

In reality, the difference in standard is illusory. Asking whether a measure is necessary entails considering alternatives. What does necessity mean if not that no alternative would do? The Article 86 formula collapses into the standard proportionality question, “is this the least restrictive measure that could be used?” Any difference between Article 86 proportionality review and proportionality review in free movement or competition is not the result of which phrase is used but of how intensely it is applied; it is of course possible to scrutinise state claims to different degrees, from a presumption that their claims of necessity are correct, to a full judicial investigation of the facts. The claim that Article 86 is more forgiving than other contexts is really a claim that Article 86 review occupies a more generous position on this scale than proportionality review in other contexts does. However, this is wrong.¹⁰⁶ While it is true that the Court has accepted state claims in Article 86 cases, this is nothing to do with the Article as such, but to do with the factual context. Suggesting that Article 86 has its own standard of review seems to rest on a misconception that free movement or competition analysis inherently entails rigid and penetrating judicial assessments, whereas Article 86 does not.

On the contrary, proportionality is inherently context dependent.¹⁰⁷ Courts applying it take into account a number of factors from political sensitivity to the complexity of the subject matter of the case.¹⁰⁸ Public law commonsense entails that they must scrutinise seriously whether justifications put forward are genuine and legitimate,¹⁰⁹ and, even if they are, that they must hold states to a meaningful standard of proportionality but should not second-guess political

¹⁰⁴ *Ibid.*

¹⁰⁵ Eg *Corbeau*, *supra* n 19; *Commission v Netherlands*, *supra* n 57; Case C-158/94 *Commission v Italy* [1997] ECR I-5789.

¹⁰⁶ J L Buendia Sierra, “Article 86: Exclusive Rights and other Anti-competitive State Measures” in Faull and Nikpay, *supra* n 43, 273, 315.

¹⁰⁷ G De Burca, “The Principle of Proportionality and its Application in EC Law” (1993) 13 *Yearbook of European Law* 111. See also J Steenbergen, “Proportionality in Competition Law and Policy” (2008) 35 *Legal Issues of Economic Integration* 259.

¹⁰⁸ *Ibid.*

¹⁰⁹ Case 34/79 *Henn and Darby* [1979] ECR 3795; Case 40/82 *Commission v United Kingdom* [1982] ECR 2793; Craig, *EU Administrative Law* (Oxford University Press, 2006), 706; Albors-Llorens, *supra* n 58, 1737; J Jans, “Proportionality Revisited” (2000) 27 *Legal Issues of Economic Integration* 239, 261–62.

choices, or engage in substantive policy redevelopment. This is the path judges have to tread whatever the Treaty article they are applying. The huge variation in the way proportionality is applied in free movement displays this.¹¹⁰ There is not a “free movement standard” but a general principle, which is used for more or less intense review according to the facts.

There is thus no reason to think that the Court would decide SGEI cases any differently if the proportionality or necessity review was done under the heading of free movement or competition rather than Article 86. The complexity of SGEIs and the many factors involved in determining what is adequate provision make it inevitable that courts will be forced into a relatively shallow review in most cases, not because of the law, but because of the limits of the judicial function and capacity.¹¹¹ The *Corbeau* deference is not a feature of Article 86, but of the nature of the context.

Additionally, within the context of Article 86 the Court has acknowledged that undertakings delivering SGEIs can only operate in financially viable circumstances.¹¹² A measure that is necessary to make the economics of the SGEI obligation acceptable attracts Article 86 exemption. This can be contrasted with the orthodox position under free movement law, that derogations from free movement cannot be relied upon for purely economic reasons.¹¹³

This difference also amounts to less than it may seem. While it is indeed a doctrine of faith that free movement cannot be restricted for economic reasons, it is the conditions that the Court attaches to this rule which are perhaps more important than the rule itself. That is to say, if the economic consequences of restricting state action are so severe that they affect other interests—the stability of the system, public health—then they may be taken into account.¹¹⁴ Saving pennies is not in itself enough to restrict fundamental freedoms, but if saving those pennies is in fact necessary to keep a social protection system stable, then it is acceptable. This is really not so different from what occurs under Article 86. Here the Court says that measures may be taken to ensure that SGEI obligations are performed under economically acceptable conditions. But what are economically acceptable conditions for an undertaking? Clearly, conditions which permit

¹¹⁰ See Jans, *ibid*; G Davies, “Abstractness and Concreteness in the Preliminary Reference Procedure” in N Nic Shuibhne (ed), *Regulating the Internal Market* (Cheltenham, Edward Elgar, 2006).

¹¹¹ See Edward and Hoskins, *supra* n 18, 170–171. On how and whether courts are capable of assessing these kinds of cases, see Hammer, *supra* n 3; D Bailey, “Scope of Judicial Review under Article 81 EC” (2004) 41 *Common Market Law Review* 1327; M Bay and J Ruiz Calzado, “Tetra Laval II. The coming of age of judicial review of merger decisions” (2005) 28 *World Competition* 433.

¹¹² See, eg *Corbeau*, *supra* n 19; *Brentjen*, *supra* n 14; *Albany*, *supra*, n 57; *TNT Traco*, *supra* n 13.

¹¹³ Eg Case 72/83 *Campus Oil* [1984] ECR 2727; Case C-157/97 *Geraets-Smits* [2001] ECR I-5473; J Snell, “Economic Aims as Justification for Restrictions on Free Movement” in A Schrauwen (ed), *The Rule of Reason* (Groningen, Europa Law Publishing, 2005).

¹¹⁴ *Geraets-Smits*, *ibid*; Case C-372/04 *Watts* [2006] ECR I-4325.

a profit. And what happens if such conditions do not exist? The very existence of the undertaking and the stability of the system are inherently threatened. Thus, while the Court sometimes states that it is not necessary to show that an undertaking would fail financially, but simply that economic conditions would be unacceptable, this is really a false opposition.¹¹⁵ In business there are ultimately only two positions: profit and failure.

The opposition can be best understood as reflecting the facts that conditions may change and that undertakings may be involved in more than one activity. Thus, providing an SGEI under loss-making conditions for a year, or some years, may not lead to failure, since the undertaking may have income from other sources and historical buffers and there may be profit in the future expected. Yet it is hard to see why such arguments could not fit within free movement too. When the Court permitted states to restrict patient freedom to receive hospital treatment abroad on the grounds that the costs involved could threaten the stability of national health systems, it was not endorsing the concrete claim that one year of free movement of patients would in fact lead to the collapse of public health systems and a partial cessation of domestic healthcare;¹¹⁶ rather, it was accepting the broader claim that, in general, over a period of time, paying for hospital care abroad could make the provision of adequate hospital care at home financially unsustainable. Such unfettered free movement would create economically unsustainable conditions for domestic healthcare provision.¹¹⁷ This is no different from the “economically acceptable” conditions of Article 86. As with proportionality, there is an issue of real substance here—how much economic downside can a state or a provider be realistically expected to bear—and the answer varies according to the factual context. That there has been a fairly provider-friendly approach in the context of Article 86 is more plausibly explained by the nature of the decisions to be made, and the fact that the providers involved are (potentially bankruptable) undertakings, rather than the nature of the Treaty article. There is no reason, on the basis of the case law so far, to think that if the same issues were considered without Article 86 the European Court of Justice would have come to different conclusions.

¹¹⁵ See *supra* n 112.

¹¹⁶ See *Geraets-Smits supra* n 113; *Watts, supra* n 114.

¹¹⁷ G Davies, “The Effect of Mrs Watts’ Trip to France on the NHS” (2007) *Kings Law Journal* 158; G Davies, “Health and Efficiency: Community Law and National Health Systems in the Light of Müller-Fauré” (2004) 67 *Modern Law Review* 94.

E. COMPETITION, ECONOMICS AND THE PUBLIC INTEREST

If competition law is founded on economics, then it is founded primarily on the idea that perfects markets maximise allocative efficiency.¹¹⁸ The essence of this idea is that in a perfect market goods and services go to the buyer prepared to pay the most for them. However, what makes this mathematical insight relevant to policy is the acceptance of an additional assumption: that how much people are prepared to pay for something is an indicator of how much benefit they derive from it. This assumption rests on the premise that people know best what is in their own interests and will increase their well-being. Then it can be claimed that a perfect market ensures goods and services go to those whose well-being is increased the most by them.

This is clearly a *prima facie* desirable policy outcome. In fact, it is acceptance of the assumptions and theory in the paragraph above which makes the economics of competition relevant for policy, and which justifies basing competition law on economics. Otherwise it would be an entirely arbitrary thing to do, and, given the complexity and contestedness of much economics, a very inefficient way of resolving disputes.¹¹⁹

Economics describes the situation of allocative efficiency as a Pareto-efficient state, which is defined as a state in which no individual can become better off without making someone else worse off. This amounts to the same as the description above for the following reasons: suppose an individual pays a certain amount for a good, but someone else is prepared to pay more. Pete paid 5 euros because he thinks it is worth 5 euros. John thinks it is worth 7 euros. In a perfect market they will then transact voluntarily, with Pete selling the good to John for a price between 5 and 7 euros. This benefits both, since Pete will be paid more than it is worth to him and John will get the thing for what he thinks is a good price. The state prior to their transaction was thus Pareto inefficient—it was still possible to make someone better off without making anyone else worse off. However, if all goods and services have gone to those prepared to pay the most then no such transactions will be possible, and an individual can only become better off (acquire goods or money of greater value to him than what he already has) if another individual is forced to engage in an involuntary transaction (so they become worse off). This idea that perfect markets lead to Pareto efficiency is called the First Welfare Theorem,¹²⁰ because, given the assumptions above, it means that perfect markets maximise total welfare, where welfare is measured in

¹¹⁸ See, eg D Gerard, “Merger Control Policy: How to Give Meaningful Consideration to Efficiency Claims” (2003) 40 *Common Market Law Review* 1367, 1368; R J van den Berg and P D Camesasca, *European Competition Law and Economics* (Antwerp, Intersentia, 2001), 1–5; Nazzini, *supra* n 70, 499. Productive and dynamic efficiency are also important, but less conceptually fundamental.

¹¹⁹ Kerber and Christiansen, *supra* n 3.

¹²⁰ See Hammer, *supra* n 3, 853.

terms of the benefit that someone acquires from possessing a good, service or money.

The kinds of measures that welfare economics says competition law should restrain are those that decrease Pareto efficiency, that is to say, move the situation further away from a Pareto-efficient state. These measures decrease welfare as measured above.¹²¹ What exactly such measures are in the real world is highly contested. One should not make the mistake of thinking that welfare economics or competition economics have reached any kind of consensus or stable state of knowledge that can be taken as reliable and authoritative gospel for the rest of us.¹²²

The problem is that there are no perfect markets. What are sometimes called market failures means that there are no actual circumstances to which the First Welfare Theorem can be unconditionally applied.¹²³ Many things, including externalities (side effects not factored into the price of a good, such as the fact that my factory pollutes your garden but you are unable to make me pay), information shortages, laws which limit and restrain economic activity, confound the theory.¹²⁴

Nor is willingness to pay for something a perfect proxy for the increase in well-being that it will bring. People have bad information, get confused about their long-term interests and do silly things.¹²⁵ Rich people may also value a euro much less than poor people do, so that their willingness to pay 10 euros corresponds to a much smaller increase in subjective well-being than would be indicated by the same willingness on the part of a poor person. "If he'll pay 10 euros, he really wants it." "She may do that on a whim, it's nothing to her." This undermines the basis for using welfare economics as a foundation for policy.

Nevertheless, there may be some markets which approximate to perfection sufficiently for economics to be worth applying, particularly since it has

¹²¹ See Nazzari, *supra* n 70; Gal and Faibish, *supra* n 78.

¹²² An overview of schools may be found in Monti *EC Competition Law*, *supra* n 62, ch 3; See also Kerber and Christiansen, *supra* n 3; van den Berg and Camesasca, *supra* n 118, 9.

¹²³ J. Stiglitz, "The Invisible Hand and Modern Economics" NBER Working Paper No W3641 (March 1991), National Bureau of Economic Research (NBER); Hammer, *supra* n 3.

¹²⁴ Gal and Faibish, *supra* n 78. It is also the case that in the real world allocative efficiency may conflict with productive efficiency: if two firms work together and divide markets, this may have a negative effect on allocative efficiency but may result in increased efficiency of production, for example through new technology. The productive efficiency gains may outweigh the allocative efficiency losses, leading to a welfare increase. For reasons of space, this is not explored further here. See OE Williamson, "Economics as an Antitrust Defense: The Welfare Tradeoffs" (1968) 58 *American Economic Review* 18.

¹²⁵ C. Sunstein, "Willingness to Pay versus Welfare", John M. Olin Law and Economics Working Paper No 326 (available on ssrn.com); M. Adler and E. Posner, "Rethinking Cost-Benefit Analysis" (1999) 109 *Yale Law Journal* 165, 197–204; LW Sumner, *Welfare, Happiness and Ethics* (Oxford University Press, 1996), 156–57; A. Sen, "Rational Fools: A Critique of the Behavioural Foundations of Economic Theory" (1977) 6 *Philosophy and Public Affairs* 317; D. Sobel, "On the Subjectivity of Welfare" (1997) 107 *Ethics*.

developed tools to deal with some of the problems mentioned above, to some extent.¹²⁶ At any rate, this is the presumption which justifies, from an economic point of view, the existence of competition law, and in particular of Articles 81 and 82. The economic justification for these articles is that they prevent undertakings from acting in a way that decreases total welfare, by making the market less perfect. Actually, in practice, competition authorities in both the EU and US concentrate on one aspect of welfare, consumer welfare, and try to interpret competition law in a way maximising this.¹²⁷ However, a core principle underlying an economics-based competition law is that it is not competition as such that is being protected, but welfare. Competition may be a good in itself for competition lawyers, but for society its value lies in its welfare effects.

However, when markets no longer approximate sufficiently to a perfect market, maximising competition may no longer maximise welfare.¹²⁸ The economic basis for prohibiting certain kinds of restrictive measures therefore disappears. The presumption that these measures are inevitably welfare reducing no longer holds. On the other hand, government intervention in markets, which in a perfect market would be welfare reducing, may in fact be welfare increasing in an imperfect market. In an imperfect market the presumption against state restrictions no longer holds either.¹²⁹ It is important to remember here that, while economics tends to measure welfare in a distinctive way—by willingness to pay—the concept of welfare involved is one based on the subjective well-being of individuals, just as in the ordinary use of the word.¹³⁰ Competition economics aims to maximise the well-being of those participating in the market—which in the case of SGEIs is almost everyone.¹³¹

Given the reality of imperfect markets, competition law is faced with a choice: (i) it can have formal clear rules, which may approximate to economic rationality in some situations but will depart from it in others. For example, it may prohibit all price-fixing or extension of a dominant position, and three times out of four this will make economic sense, but in odd or complex markets it will not, and the prohibition may actually decrease welfare and be Pareto inefficient. *Tant pis*—law is not perfect; or (ii) it can decide to follow economics, and take a case-by-case approach, based on economic analysis, to each situation. Then it will ask in each case, “is this measure Pareto inefficient/welfare reducing?” If so, it will be prohibited; if not, it will be permitted. This is the approach that is in fashion in

¹²⁶ See Hammer, *supra* n 3.

¹²⁷ On the EU see K Cseres, “The Controversies of the Consumer Welfare Standard” (2007) 3 *Competition Law Review* 121.

¹²⁸ Gal and Faibish, *supra* n 78; Hammer, *supra* n 3; Breyer, *supra* n 83.

¹²⁹ *Ibid.*

¹³⁰ See *supra* n 125.

¹³¹ Cf M Adler “Beyond Efficiency and Procedure: A Welfarist Theory of Regulation” (2000) 28 *Florida State University Law Review* 241.

the EU, and which the Commission and most lawyers claim is gaining ground in EU competition law.¹³²

SGEI markets are some of the most dysfunctional markets that exist.¹³³ Almost everything is stacked against their good functioning. Products are complex, so that people will lack information or the ability to process it. Good choices require a long-term perspective and a good understanding of risk, which research suggests most of us do not have.¹³⁴ Externalities are ubiquitous; my welfare is very much affected by the education, healthcare and general public services that my neighbours receive—it changes the kind of society that I live in and the quality of my life. There are certain kinds of products that people would like to buy but that markets are unable to deliver; security and certainty are important parts of many public services, the guarantee that terms will be continued for the long term, but only the state can provide such guarantees. Suppose I want to buy more than healthcare, I also want to buy a guarantee that I will be looked after for the rest of my life as long as I obey the law? No market can offer that product. Finally, factors such as differences in income mean that willingness-to-pay is a poor way to measure welfare gains.

SGEI markets are therefore so riddled with distortions that state intervention may often be a welfare-increasing Pareto-improvement. The challenge is to identify when this is the case, so that welfare-improving public measures can be permitted by the competition rules while welfare-reducing ones continue to be blocked. A number of analytic tools and frameworks can be useful here.

One is the distinction between public measures which aim to compensate for market failures, and therefore aim to be welfare increasing, and public measures which do not in fact aim to be Pareto-improvements at all.¹³⁵ The first category would include many measures addressing the fact that, for example, people lack information, cannot understand it or tend to be short-term thinkers, or the fact that the market is unable to provide certain kinds of products. Rules compensating for these failures, if successful, are Pareto-improvements. In the second category one would find primarily redistributive and justice-based measures. Ideas of justice and fairness may, for example, dictate that certain goods should be accessible to all on equal terms not because this in fact increases total welfare or compensates for market failures, but for other kinds of moral and social reasons.

A strong tradition of competition theory, stemming from Bork, says that competition should take no account of distribution.¹³⁶ It should maximise total

¹³² An overview of the turn to economics in EU competition law may be found in Pera, *supra* n 60; G Monti, "New Directions in EC Competition Law" in T Tridimas and P Nebbia (eds), *European Union Law for the Twenty-First Century* (Oxford, Hart Publishing, 2004) 177.

¹³³ See also Sauter, *supra* n 2, 179–81.

¹³⁴ Sunstein, *supra* n 125.

¹³⁵ Gal and Faïbish, *supra* n 78, 70–75.

¹³⁶ See RJ Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York, Basic Books, 1978), 90.

welfare, and then other policies should deal with redistribution. In fact this hard-core view is probably no longer held by a majority of economists any more, but it does have a certain attractive clarity.¹³⁷ It could, moreover, be understood to mean that redistributive measures which limit competition should be treated as anti-competitive, because they are not concerned with correcting market failures and increasing total welfare, but with moving that welfare around. It might therefore offer a framework for distinguishing SGEI measures that competition law can permit from those that must find a justification external to competition—such as Article 86.

However, in practice the distinction is less useful than it may appear. States rarely argue that they are reducing total welfare, in a Pareto-inefficient way, in the name of justice and fairness. Rather, they deny the opposition of welfare and justice.¹³⁸ They usually make the claim that justice and fairness are in fact Pareto-efficient, because a lack of justice or fairness represents a significant externality. Thus even redistributive measures are in fact corrections for market failure. For example, a government wishing to increase equality is likely to justify its measures by saying in the long term this increases everybody's welfare, rather than openly stating that it is prepared to make society as a whole less well-off to help the few.

As a result, almost all public interventions in SGEI markets will be claimed to be welfare improving.¹³⁹ The question of whether competition law should permit them is then primarily evidential.¹⁴⁰ Here it has been claimed that the appropriate approach is to treat government claims to be remedying market failure with great scepticism.¹⁴¹ One of the premises of market economics is that individuals know their interests best, and no state can be well enough informed to allocate resources as efficiently as markets can.¹⁴² Hence it is often argued by economists that, while state intervention in imperfect markets may be welfare increasing in principle, there should be a very high burden of proof on the state. Allowing the government to just assert that it knows best could be a slippery slope.

In a "normal" market there is much to be said for this approach. However, it is the nature of SGEI markets that the kind of externalities and failures involved are very difficult to assess. How much is well-being reduced by inequality or the unhappiness of others? How much do people understand their future public

¹³⁷ H Hovenkamp, "Post-Chicago Antitrust: A Review and Critique" (2001) *Columbia Business Law Review* 257, 269–70.

¹³⁸ Gal and Faibish, *supra* n 78, 72.

¹³⁹ See Loozen, *supra* n 76, 37.

¹⁴⁰ See Gal and Faibish, *supra* n 78.

¹⁴¹ IJ Spiwak, "Antitrust, the "Public Interest" and Competition Policy: The Search for Meaningful Definitions in a Sea of Analytical Rhetoric" (1997) *Antitrust Report* 2; for a more moderate view, see Gal and Faibish, *ibid*.

¹⁴² F Hayek, "The Use of Knowledge in Society" (1945) 35 *American Economic Review* 519.

service needs? How much would they pay for security and certainty? There are no ready-made economic theories that can provide quick answers to whether public intervention on grounds of such complex and subtle market failures is welfare reducing or not. One could commission major research, of course, but these are not questions to which final answers can be expected. They involve the kind of controversial judgements that are the stuff of politics. Nor can the market, even in principle, address all these issues, since to some extent they involve the costs in public happiness of market freedom itself.

Yet they are real externalities, of importance to welfare, and to simply ignore them because they are difficult would undermine the legitimacy and rationality of policy. Thus a more rational approach is perhaps to concede a certain status to the judgements of elected and accountable public authorities about whether their actions increase welfare. They must provide, perhaps, coherent arguments, but their judgement of the factual questions on individual values and preferences deserves a certain deference. Thus, whether a market restriction infringes competition rules should be treated as an economic question about Pareto-efficiency and welfare, but the legislator should be accorded deference on factual issues which science cannot yet answer clearly. Competition cannot avoid a “total welfare increase” general interest defence if it is to be economically rational,¹⁴³ and no authority is as well placed to judge the relevant welfare issues in a dysfunctional market as the state.

F. CONCLUSION

1. The Senselessly Divisive Effect of Article 86

The harm, apart from confusion, which Article 86 causes is that competition and economics get an undeservedly bad name; EU competition policy seems as if it is heartless and socially harmful. This undermines the legitimacy of the EU, and the opposition between market and society is once again artificially resurrected, with all the problems that this creates for rational politics and policy. Article 86 is not just intellectually weak, it tries to reopen old political wounds and redivide societies.

Article 86 also makes a symbolic division between SGEIs and other services. Somewhat similarly to the above, this division both rests upon and supports the idea that measures concerning SGEIs are unique and require special treatment, in contrast with other national measures, concerning, for example, other services. This is wrong. Many national rules can be socially important and the balancing involved in SGEIs is not unique at all, even if it may perhaps be more explicit

¹⁴³ Which would be analytically similar to an efficiency defence: see Hammer, *supra* n 3, 876. See also his discussion of a “market failure defence”, 879–82.

and important than in many contexts. Indeed, it is one of the achievements of the European social market model that the old-fashioned oppositions of public and private, social and market, and state and business have been set aside in favour of a co-operative integration of the two in the service of both.¹⁴⁴ Attempting to undo this work by designating some services and the regulation concerning them as “of general interest”, and thus implicitly designating the remainder as “purely economic”, is positing a division that is not just harmful, but, in the modern European state, is factually false. The concept of SGEIs as a fundamentally separate group requiring a fundamentally specific analysis does a great injustice to the complexity of the interaction between social and economic interests. Just as economic activity provides the basis for many social benefits, the regulation of economic activity, in general, is of great social importance, and the choice of technique and scope of regulation is important for the same kind of social reasons as the regulation of SGEIs is important: they serve the goal of creating a socially just, aesthetically pleasing and financially viable society.

2. Undertakings as State Agents

Competition law is in a sense struggling with issues which the Treaty and the EU have already resolved. The tension between market freedom and regulation is not to be resolved in favour of one side or the other, but is an ongoing balance. Markets contribute to social contentment, but so do market restrictions in the form of law. Hence while the EC Treaty reflects a positive view of competition and markets, it does not impose any general requirement that states only regulate in demonstrably quantifiably efficient ways. The assessment of which laws improve the general good continues to be, often, too subtle and complex for economists to measure, and remains within the political domain.

When undertakings act as agents of the state, there is no particular reason to treat their actions differently from state actions.¹⁴⁵ SGEI measures taken by an undertaking, but which fall within the remit of a public mission entrusted to that undertaking, should not really attract the attention of Article 82 at all. The undertaking is here acting on behalf of public authority, and should be held to the same standards as public authority—those of free movement law and of Article 10. The only reason to diverge from this would be if there were some principled reason to discourage states from co-operating with undertakings in this way.

¹⁴⁴ See J van de Gronden, “The Internal Market, the State, and Private Initiative” (2006) 33 *Legal Issues of Economic Integration* 105.

¹⁴⁵ See *supra* n 91. See also the Court’s view of the public sphere in the context of direct effect; “a body which has been made responsible for providing a public service under the control of the state is *included* [original italics] within the Community definition of a public body”: P Craig and G de Burca, *EU Law* (Oxford University Press, 3rd edn, 2006), 286, analysing Case C-188/89 *Foster and Others v British Gas* [1990] ECR I-3313.

It is hard to see what that reason would be, and it would be regressive were it to exist. The interactive partnership between states and private undertakings in the general good is a very European development, and one at the heart of the continental European social-market model. It is a rejection of the hard division between public and private, or state and market or economic and non-economic interests which has caused so much conflict both on the global scale and within nations. It has been adopted by the EU, and among policymakers—as within society—seems firmly entrenched. There is little call for state control of economic life, but not for deregulation of sensitive public services. Cooperation between public regulators and private providers is Europe's preferred path, and such co-operation inevitably entails a degree of decentralisation of decision-making. The test, then, should not be whether the resulting measures are abuse, since they are not adopted in the commercial pursuit of market success, not *qua* undertaking, but the test that is normally applied to market-restricting regulation—whether it is proportionate.

3. A Directive on Services of General Economic Interest

In recent years there have been many calls for a directive on services of general economic interest, as a way of providing legal certainty in this troubled and important area.¹⁴⁶ However, horizontal regulation is not the answer. The conclusions above are that SGEIs are just like other areas where individual freedom and other policies collide: there is a need for a balancing process, and judges must engage with this to the best of their capacity. Further elaboration is simply adding confusion. Where these simple general principles are not enough, the answer is in sector-specific rules that can engage with the technical oddities of the particular context. However, it is hard to see how a horizontal elaboration of the general principle that it is acceptable to limit competition and free movement where necessary for important social goals would take that principle any further. The law is really quite easy. The difficult work is in judging the facts.

The call for such a directive arises out of the confusing state of the case law and the desire for certainty. Here is a suggestion: certainty can be more simply and reliably achieved if states authentically take the interests of free movement and competition into account when designing their SGEI systems.¹⁴⁷ Then, if challenged, they will be likely to win their cases. Instead, there is a tendency to seek procedures and rules which exempt them from this requirement, to look for a safe garden where they can think about their SGEI preferences and safely

¹⁴⁶ See M Krajewski, "Providing Legal Clarity and Securing Policy Space for Public Services through a Legal Framework for Services of General Economic Interest. Squaring the Circle?" (2008) 14 *European Public Law* 377.

¹⁴⁷ M Maduro, *We the Court* (Oxford, Hart Publishing, 1998), 167–75.

ignore the competitive and trade-restrictive effects. That garden will never be found as long as a state is within the EU. The desire for it is probably an organisational side effect—those responsible for policy in one area do not want to be burdened by the need to consider others. Nevertheless, for a state which is a member of the EU, it is a disreputable search.